**U.S. Department of Labor**

Office of Administrative Law Judges
O'Neill Federal Building – Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

**Issue Date: 29 June 2007**

CASE NO.: 2006-LDA-00076
OWCP NO.: 02-135655

In the Matter of

**R. L.**[1]
Claimant

v.

**SERVICE EMPLOYERS INTERNATIONAL, INC.**
Employer

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA**
Insurer

*Appearances*:

David A. Kelly (Monstream & May),
Glastonbury, Connecticut, for the Claimant

Robert N. Dengler (Flicker Garelick), New York,
New York, for the Employer and Insurer

*Before*: Daniel F. Sutton
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

### I. Statement of the Case

[1] In accordance with the Claimant Name Policy, which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Mem. from John M. Vittone, CJ, Claimant Name Policy (July 3, 2006) *available at* http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

The above captioned matter arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA" or "Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq.* Claimant R. L. ("Claimant") seeks temporarily total disability benefits from the Respondent, Service Employee's International , Inc., ("SEII" or "Employer"), and its insurance carrier, The Insurance Company of the State of Pennsylvania ("Insurer" or "Carrier") as a result of an injury arising from his employment with the Respondent. The parties were unable to resolve the claim during informal proceedings before the Office of Workers' Compensation Programs ("OWCP"), and the claim was transferred to the Office of Administrative Law Judges for formal hearing pursuant to section 19(d) of the LHWCA. 33 U.S.C. § 919(d).

In lieu of a hearing, the parties submitted stipulations and documentary evidence ("CX" for Claimant exhibits, "EX" for Employer exhibits and "JX" for joint exhibits). The parties stipulated that the only contested issue is the average weekly wage ("AWW") to be used in calculated the compensation to which the Claimant is entitled as a result of his disability. JX-1. The Claimant's brief on AWW ("Cl. Br.") was filed March 16, 2007, and the Employer's brief on AWW ("Er. Br.") was filed March 19, 2007. The record is now closed.

After careful analysis of the evidence contained in the record, and after consideration of the parties' arguments, I conclude that the Claimant is entitled to an award of temporary total disability compensation based on an AWW of $1,435.88, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

## II. Stipulations and Issues Presented

On September 11, 2006, the parties filed the following joint stipulations which were entered into the record as JX 1:

> 1). This claim is covered by the Defense Base Act, 42 U.S.C. § 1651 *et seq.*
>
> 2). Since April 2, 2004, Claimant has been and remains temporarily totally disabled on account of post-traumatic stress disorder, which condition is causally related to his employment for Respondent in Iraq.
>
> 3). Claimant requires additional treatment and shall remain authorized to treat with Andrew Meisler, Ph.D., a licensed psychologist. Dr. Meisler shall be paid by Carrier-Respondent in accordance with the applicable fee schedule and Section 7 of the LHWCA.
>
> 4). Claimant shall remain entitled to anti-depressant drug medication, as prescribed by Ian Tucker, M.D. and in accordance with the applicable fee schedule and Section 7 of the LHWCA.

JX 1 at 1-2. Br. at 6-7. I have reviewed the stipulations and hereby adopt them as my findings.

## III. Findings of Fact and Conclusions of Law

A. Background

The underlying facts in the case are undisputed. In 2004, the Claimant, a veteran of the United States Army, accepted a position as a truck driver with Kellogg Brown & Root ("KBR") in Iraq. Cl. Br. at 3. Kellogg Brown & Root is a division of SEII, and a contractor for the United States government. *Id.* The Claimant, who had learned to drive trucks while stationed in Germany with the Army, attended truck driving school and obtained a commercial truck driver's license. Er. Br. at 2-3. From that time until he went to Iraq, the Claimant worked as a truck driver for various companies, and he drove an equipment truck during a summer music tour. Er. Br. at 3. The Claimant typically worked 40 hours per week while working in this capacity in the United States. Cl. Br. at 3. The Claimant's tax returns indicate he earned $22,503.00 in 2000; $34,786.00 in 2001; $39,221 in 2002; and $29,287.00 in 2003. EX 4.

The Employer provides logistical support to the U.S. military in Iraq. Er. Br. at 3. In January of 2004, the Claimant signed a one year employment contract with the Respondent / Employer to work as a truck driver in the U.S. Army's Central Command Area of Operation. *Id., see also,* EX 1 at 21-22 and EX 2. The duration of the employment contract signed by the Claimant was one year and the Claimant had the option to renew it upon its expiration. EX 2. The Claimant testified at a deposition taken in April of 2005 that he was aware that "KBR employees [were] getting killed" but wanted to help "rebuild Iraq." EX 1 at 33-34. The employment contract also warned that the Claimant's endorsement would "constitute acceptance and acknowledgement of the risks" inherent in "a potentially hazardous environment" and included a clause entitled "Settlement of Personal Affairs." EX 2 at 2, 10. Indeed, upon his arrival in Iraq, the Claimant found the situation on the ground to be "a lot more dangerous than they led us to believe." EX 1 at 34, 45.

While in Iraq, the Claimant was routinely expected to drive to and through "red zones" which are areas designated the U.S. Government due to their proximity to dangerous locales and the increased likelihood of an ambush. Cl. Br. at 3-4. Claimant regularly worked "at least 12 hour days," seven days a week. EX 1 at 38-39. The Claimant testified he believed his base pay rate was predicated on an 84-hour work week, and thus it can be implied that he was expected to typically work 12 hours per day, seven days per week. EX 1 at 41-42.

The Claimant testified that truck drivers were expected to adhere to appropriate rules and procedures of the environment. EX 1 at 50-53. Chief among those rules was a prohibition against stopping at any point along Iraqi roadways for fear of being attacked by insurgents. In addition, drivers were instructed not to attempt to avoid potential collisions by veering to the side of the road where they would be more likely to hit an improvised explosive device ("IED") planted by opposition forces. EX 1 at 50. Claimant testified that, upon confronting an obstacle in the roadway, "the rule was plow it." EX 1 at 51.

On March 23, 2004, the Claimant was driving his truck as part of a re-supply convoy when he saw young Iraqi children "running out of the fields … because here comes the convoy."

EX 1 at 59-60. A young child suddenly ran between the Claimant's truck and the vehicle in front of him. *Id.* The Claimant, who by rule was not permitted to stop, struck and killed the child.[2] *Id.* This incident was deemed accidental. Cl. Br. at 5. Following the accident, the Claimant was subjected to mandatory debriefing interrogations by the military and pursued mental health counseling. Cl Br. at 5. The Claimant was subsequently determined to be unable to return to his job and was sent home to the United States in early April, 2004. *Id.* He worked a total of ten weeks in Iraq and earned a total of $14,735.88. EX 3. The Carrier has paid temporary total benefits of $598.10 per week since the Claimant's return from Iraq. Cl. Br. at 6.

Since returning to the United States, the Claimant has continued to receive medical treatment, and he has been diagnosed with post-traumatic stress disorder ("PTSD") and continues to be treated for this condition, per the medical reports from the Claimant's treating psychiatrist, Dr. Meisler, as well as reports of Drs. Panich and Kaplan. Er. Br. at 7, Cl. Br. at 5-6, EX 1 at 77-78, *see also* CX 3, CX 1, CX 9. The Claimant testified that he now fears being involved in another accident, or hitting any object at all, and that the accident in Iraq has caused him to be fearful whenever he is in any type of vehicle and driving a car puts him in a state of panic. EX 1 at 107-111, 116. In addition, the Claimant has problems with depth perception, and he has a difficult time concentrating. *Id.* at 123. As a result, the Claimant is unable to return to his previous employment as a truck driver.

At his deposition which was taken after the accident, the Claimant was questioned about whether he would have extended his work in Iraq upon expiration of his one-year contract had he not suffered a disabling injury. He testified that whether he extended would have "depended on the stability of Iraq at that point." EX 1 at 55. He further testified that he would not have extended if conditions did not improve, but he had no thoughts about leaving Iraq before completing his one-year contract. *Id.* at 55-56.

A. Average Weekly Wage

Section 10 of the LHWCA sets forth three alternative methods for determining a claimant's average annual earnings. The three computation methods, set forth in Sections 10(a), 10(b), and 10(c), are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 343-344 (1992). The ALJ must arrive at a figure which approximates an entire year of work (the average annual earnings). That figure is then divided by 52, as required by Section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section 10(a) applies if the employee "worked in the employment … whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a). Both parties agree, and I find, that Section 10(a) cannot be applied in this case because the Claimant only worked for ten weeks as a military truck driver which is not substantially the whole of the year as that term has been defined. *See Duncan v. Washington*

[2] The Claimant testified that had he swerved to avoid the child, he "would have probably killed another half dozen kids by laying that truck over." EX 1 at 60.

*Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990) (finding 34.5 weeks of work to be "substantially the whole of the year," where the work was characterized as "full time" and "steady" or "regular.").

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to Section 10(c). *See Palacios v. Campbell Indus.*, 633 F.2d 840, 842-843 (9th Cir. 1980) (*Palacios*). Section 10(b) calculates the AWW based on a five or six day per week employee who worked in permanent or continuous employment, but "did not work for substantially the whole year" prior to his injury. 33 U.S.C. § 910(b). *See also Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991) (*Gatlin*). In determining the annual salary using Section 10(b), the Court is required to look to the wages of other workers in the same employment situation and base the AWW on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). Where the wages of a comparable employee or employees do not fairly and reasonably approximate the pre-injury earning capacity of the claimant, the court must resort to Section 10(c). *Palacios*, 633 F.2d at 843.

In his brief, the Claimant suggests that Section 10(b) should be used to determine his AWW based on "the employment history of a typical worker in similar employment and in the same locality." Cl. Br. at 10. The Employer argues that Section 10(b) cannot be applied here as the Claimant was a seven day per week worker, and 10(b) only applies to five or six day per week workers. In *Patton v. Brown & Root Services*, 40 BRBS 32, 41 (ALJ), the administrative law judge concluded that Section 10(b) could not be used to determine the AWW of seven day per week workers. I find this interpretation consistent with the plain language of the statute and, therefore, conclude that Section 10(b) cannot be applied in this case. Moreover, even if Section 10(b) could be applied to a seven day per week worker, I find that the Claimant has not met his burden of producing sufficient evidence to support his contention that his AWW should be based on the wages earned by other truck drivers in Iraq. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 1179 (9th Cir. 1976) (The party contending actual wages are not representative bears the burden of producing supporting evidence). In support of his Section 10(b) argument, the Claimant submitted evidence of earnings from five other drivers who worked substantially the whole year prior to the injury. Cl. Br. at 10-12. Four of the five workers the Claimant submitted as comparables had significantly higher weekly earnings during their time in Iraq than did the Claimant, while one had slightly higher earnings. There was no evidence submitted regarding the duties performed by these individuals other than a statement in the Claimant's brief that a "comparable worker would be any SEII employee that was employed as a truck driver in Iraq." Cl. Br. at 11. It is conceivable that these individuals had a higher base rate of pay due to their seniority or other factors that simply are not part of the evidentiary record in this matter. Consequently, I conclude that Section 10(b) cannot be applied.

In the alternative to Section 10(b), the Claimant relies on Section 10(c) which the Employer agrees is the appropriate provision for calculating AWW in this case. Cl. Br. at 13; Er. Br. at 11. Section 10(c) is applicable to cases where the methods of subsections (a) and (b) cannot be reasonably and fairly applied or when insufficient evidence exists on the record to make a determination of the average daily wage of the Claimant. *Gatlin* at 822; *Todd Shipyards*

*Corp. v. Director, OWCP*, 545 F.2d 1176, 1179 (9th Cir. 1976). Section 10(c) is applied when actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage-earning capacity of the claimant. *Gilliam v. Addison Crane Co.,* 21 BRBS 91, 92-93 (1987).

In determining earning capacity under 10(c), the ALJ "must make a fair and accurate assessment of the injured employee's earning capacity, the amount that the employee would have the potential and opportunity of earning absent the injury." *Gatlin* at 823. While the claimant's actual earnings at the time of injury do not control, it remains a factor to consider. *Id.* A definition of "earning capacity" for purposes of this subsection is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries, Inc.* 12 BRBS 410, 413 (1980). An administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c); *Staftex Staffing v. Director, Office of Worker's Compensation Programs*, 237 F.3d 404, 406 (5th Cir. 2000); and the Board will affirm an administrative law judge's determination of a claimant's average weekly wage under that subsection if the amount calculated represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Story v Navy Exchange Service Center*, 33 BRBS 111, 118 (1999); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549, 566 (1981).

The Claimant argues he should receive an AWW based entirely on the income he received while working in Iraq. Cl. Br. at 13. In particular, the Claimant relies on *Zimmerman v. SEII*, BRB No. 05-0580 (unpublished) (Feb. 22, 2006) where the Board upheld the determination of an AWW extrapolated from the claimant's earnings in Kuwait, which constituted a six week period prior to his injury, stating the ALJ's finding was "reasonable and supported by substantial evidence." Slip op. at 4-5. The Claimant also cites *Patton v. Brown & Root Services*, 40 BRBS 32 (ALJ) (Jan. 24, 2006) and *Collins v. SEII*, 40 BRBS 1 (ALJ) (Jan. 11, 2006) in support of his argument. In *Patton*, the ALJ relied on the Board's decision in *Miranda v. Excavation Construction Co.*, 13 BRBS 882 (1981) and calculated an AWW consistent with what the Claimant was earning while in Iraq, stating that "combining Claimant's earnings as a self employed truck driver in the U.S. at a significantly lower rate than he earned at the time of injury would be unfair." *Patton*, 40 BRBS at 42. In *Collins*, the ALJ noted the Claimant's desire to return to Iraq following an injury which occurred three months into his service there, and awarded the Claimant an AWW equivalent to his Iraq earnings. *Collins*, 40 BRBS at 4.

The Employer, relying on the Claimant's deposition testimony as support for the proposition that he would not have continued working in Iraq upon completion of his one-year contract, submits that the Claimant's AWW should be determined using his earnings for the 52 weeks immediately preceding his injury (42 weeks of stateside earnings added to the 10 weeks of Iraq earnings) to obtain the applicable annual salary. Er. Br. at 16-17. The Employer contends that including the Claimant's pre-Iraq earnings would strike the "proper balance" necessary. Er. Br. at 16. The Employer argues that calculating Claimant's earnings in this manner would allow him to earn "more that the weekly rate he earned stateside in 2003, and would have been expected to earn upon his return from Iraq." Er. Br. at 17. SEII argues this is the proper result because, based on the Claimant's deposition testimony, "we may conclude with certainty that Claimant's employment in Iraq would have lasted only one year." Er. Br. at 6.

In *Miranda*, the Board ordered reconsideration in light of the Ninth Circuit's opinion in *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979) holding the determination of AWW calculated pursuant to Section 10(c), based on higher wages earned over a 10 week period, was proper where the ALJ reasonably considered evidence related to the claimant's earnings of employment when the injury occurred as well as previous employment of the claimant. *Bonner*, 600 F.2d at 1291-1292. The Court held that the ALJ was not required to base the calculation on previous, lower-paid employment where it was possible to draw an inference that the worker would have continued to earn the higher wage if not for the injury. *Id.* at 1293. Relying on this holding, the Board in *Miranda* remanded for reconsideration the determination of AWW, which had been calculated by diving total earnings for the previous year by the number of weeks worked, in light of *Bonner*, where there was evidence showing the employee had earned more money for a "few weeks at the employment where he was injured than he earned in his previous employment." *Miranda*, 13 BRBS at 886. The Board continued, "a calculation based on this substantial increase in wages at the employment where he was injured would best adequately reflect claimant's earning potential at the time of his injury," and directed the ALJ to "consider the earnings of the claimant for the seven or eight weeks which he worked for the employer and to recomputed the average weekly wage in conformity with this opinion." *Id.* Similarly, in *Healy Tibbets Builders, Inc. v. Director, Office of Worker's Compensation Programs*, 444 F.3d 1095 (9th Cir. 2006), the Court upheld an ALJ's AWW determination that was based solely on a deceased worker's higher earnings in a new job (13 weeks) in which he was accidentally killed. The Court held that found substantial evidence existed to support the ALJ's determination that these wages represented the Decedent's future wage-earning capacity at the time of injury. *Id.* at 1103.

In considering the Claimant's deposition testimony, one must consider the totality of the available evidence as it applies to this particular set of facts. The Claimant was diagnosed with chronic PTSD, a fact which the parties stipulated has left him temporarily totally disabled. JX 1. A review of Dr. Meisler's report submitted in evidence reveals that the Claimant's "*chronic symptoms* include intrusive thoughts of the event, *distress in response to reminders of the event* (e.g. … news from Iraq, etc.), nightmares of the event, efforts to suppress thoughts of the event, *avoidance of discussions and reminders, emotional avoidance*…" CX 3 at 1 (emphasis added). In addition, the treatment note from Dr. Panich of the Combat Stress Control in Iraq indicates that the Claimant suffers from "flashbacks, anxiety [and] depression," his "reaction to the traumatic event was further complicated by the fact that he had previously developed a strong affection and relationships with Iraqi children and the event occurred on his birthday" and "he continues to be reactive to the environment." CX 1 at 1. Finally, Dr. Kaplan's report indicates that the Claimant "relives the experience daily" and concurs with the PTSD diagnosis. EX 9 at 1. Neither stateside psychiatrist is of the belief that the Claimant can return to work as a truck driver. EX 3 at 2, EX 9 at 4. Thus, it is hardly surprising that the Claimant would express some doubt about whether or not he would have continued to work in Iraq following the expiration of his initial one-year contract. It is clear from his testimony that, like so many other contractors, the Claimant was drawn to Iraq by the earning potential and that he would have fulfilled his contract and been given the option to sign on for another year but for his disabling accident. What would have happened to the Claimant had he not been rendered disabled by a tragic accident necessarily is speculative, and I am unwilling on this record to conclude that he would

not have continued to work in Iraq had he not been injured. What is clear from the terms of the Claimant's employment contract is that he was expected to fulfill his year long commitment. EX 2. If his accident had occurred upon the completion of 34.5 weeks of work in Iraq instead of 10, the Claimant would likely have benefited from a much higher AWW. *See Duncan*, 24 BRBS at 136. Therefore, I conclude that using the Claimant's earnings as a truck driver in Iraq provides a fair and accurate assessment of the amount that he would have the potential and opportunity to earning absent the injury. The Claimant earned $14,735.88 during his ten weeks of employment in Iraq. Thus, the Claimant's AWW, as determined by dividing his total earned wages by the total number of weeks he worked, is $1,473.58.

C. Benefits Due

The Claimant is entitled to temporary total disability compensation since April 2, 2004 at the rate of $982.59 per week which is equal to two-thirds of his AWW. 33 U.S.C. § 908(b). As the Employer had not paid the full amount of compensation to which the Claimant is entitled under the LHWCA, he will be entitled to prejudgment interest on any compensation payments that were not timely made. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this decision and order with the District Director. In addition, the Claimant, as stipulated by the parties, is entitled to ongoing medical care for his work-related PTSD. 33 U.S.C. § 907.

D. Attorney's Fees

Finally, having successfully established his right to additional compensation, the Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA. 33 U.S.C. § 928; *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976). The Claimant will be allowed 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and the Employer will be granted 15 days to from the filing of the fee petition to file any objection.

## IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

(1) The Employer, SEII, shall pay to the Claimant, R. L., temporary total disability compensation at the rate of 982.59 per week, commencing on April 2, 2004 and continuing until further order;

(2) The Employer, SEII, shall be entitled to a credit for any voluntary payments already made to the Claimant pursuant to 33 U.S.C. § 914(j);

(3) The Employer, SEII, shall pay the Claimant, R. L., interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (2003);

(4) The Claimant's attorney shall file, within 30 days of the receipt of the filing of this Decision and Order in the office of the District Director, a fully supported and itemized fee petition, sending copies thereof to counsel for the Employer, who shall then have 15 days to file any objections;

(5) All computations of benefits and other calculations which may be provided for in the Order are subject to verification and adjustment by the District Director.

**SO ORDERED.**

A

**DANIEL F. SUTTON**
Administrative Law Judge

Boston, Massachusetts